LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JUN 11 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1949

No. [redacted] 114

FREIGHT FORWARDERS INSTITUTE,
Appellant,

vs.

PACIFIC COAST WHOLESALERS' ASSOCIATION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

FRANK D. CATLIN,
HARRY C. AMES,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Jurisdiction	2
Statutes involved	2
Nature of the case and rulings of the Court below	2
The questions presented are substantial	5
Appendix "A"—Opinion of the District Court	7
Appendix "B"—Findings of fact and conclusions of law of the District Court	16
Appendix "C"—Final decree of the District Court	22

Table of Cases Cited

Pacific Coast Wholesalers' Association—Investigation of Status, 269 I.C.C. 504	2
United States v. *Capital Transit Co.*, 325 U. S. 357	2
United States v. *Detroit & Cleveland Navigation Co.*, 327 U. S. 236	2
United States v. *Pennsylvania Railroad Co.*, 326 U. S. 612	2
United States v. *Pierce Auto Freight Lines*, 327 U. S. 515	2

Statutes Cited

Act of June 25, 1948 (28 U.S.C. 1253 and 2101(b))	2
Interstate Commerce Act Sections 402(a)(5), 402(c)(1), and 410(a), 49 U.S.C. 1002(2)(5), 1002(c)(1), and 1010(a)	2

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Civil Action No. 8588-WM

PACIFIC COAST WHOLESALERS' ASSOCIATION, A CORPORATION AND ELMER J. JENSEN, PERCY T. LYON, IRA C. LAMBERT, G. A. OLSON, AND SOL SMITH, *Plaintiffs.*

v.

UNITED STATES OF AMERICA, *Defendant,*

AND

INTERSTATE COMMERCE COMMISSION AND FREIGHT FORWARDERS INSTITUTE, *Interveners.*

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, intervener-appellant, Freight Forwarders Institute, submits herewith its statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment and decree of the district court in this cause made on February 18, 1949. Petition for appeal together with an assignment of errors was filed on April 12, 1949.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the decision in this cause is conferred by the Judicial Code, as revised by the act approved June 25, 1948, effective September 1, 1948, Title 28, U. S. Code, Sections 1253 and 2101(b), consolidating and continuing the substance of prior provisions of law relating to direct appeals from decisions of three-judge courts in suits to set aside orders of the Interstate Commerce Commission. The following decisions, appeals in which were taken pursuant to such prior provisions thus codified, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in these cases. *United States* v. *Capital Transit Company*, 325 U. S. 357; *United States* v. *Detroit & Cleveland Navigation Company*, 327 U. S. 236; *United States* v. *Pennsylvania Railroad Company*, 326 U. S. 612; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515.

Statutes Involved

Interpretation of several sections of Part IV of the Interstate Commerce Act are involved in this appeal, to wit, 402(a)(5), 402(c)(1), 410(a); 49 U. S. C. 1002(2)(5), 1002(c)(1), 1010(a), respectively.

Nature of the Case and Rulings of the Court Below

This is an appeal from the final decree of the District Court of the United States for the Southern District of California, Central Division, entered February 18, 1949, in which it set aside the findings and order of the Interstate Commerce Commission in a proceeding styled *Pacific Coast Wholesalers' Association—Investigation of Status*, 269 I. C. C. 504. In such decision the Commission had ordered the respondent association to cease and desist from handling

shipments on which the consignors (nonmembers of the association) had either (a) prepaid the freight charges at point of origin, or (b) allowed the freight charges, paid at destination, to be deducted, as such, from the face of the invoice of sale.

The facts are these: Taking advantage of the provision in section 403(c)(1) of Part IV of the Interstate Commerce Act, which exempts from regulation "the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates," the shippers of some seven[1] major classifications of freight banded together into an association for the purpose of handling the less-than-carload shipments of the members. A manager—G. A. Olson, a co-plaintiff herein—handled the physical details connected with the service and was compensated by a gross allowance in cents per 100 pounds out of which he paid office expenses, etc.

The rates charged by the association to its constitutent membership are the published rates of the regulated freight forwarders, plus 3% to effectuate a complete parity with the regulated forwarders rate, to which latter the 3% is added as a transportation tax. Out of this gross amount the manager—Olson—deducts his commission, an agreed amount called a revolving charge to take care of working capital, and the costs of assembling, line-haul service, and distribution. The balance, amounting to as much as 45 cents per 100 pounds, is refunded each month to the members of the association.

The operations of the association are physically and

---

[1] Shipbuilders, automotive supply companies, hardware jobbers, marine supply companies, mine and smelter supply companies, bridge and dredging companies, and machinery and supply companies.

functionally the same as those of the conventional and regulated freight forwarder, i. e., small shipments are brought into and assembled at Chicago, Ill., where they are consolidated into carload shipments. These latter shipments are handled by rail to one (or more) of the association's 8 distributing points[2] at which they are broken up and distributed to association members (or to customers of such members). The association handles business for sale and distribution in the States of California, Arizona, Oregon, Washington, Idaho, Utah, and Nevada.

Every pound of freight handled by the association constitutes traffic which, but for the association, would normally be handled by the regulated freight for forwarder. If so handled, however, the regulated forwarder would have to apply his published tariff rate without deviation—he could not make refunds of as much as 45 cents per 100 pounds to his patrons. Additionally, he is under the constant and expensive burdens of regulation such as the filing of tariffs, the keeping of accounts, the rendition of periodic reports all of which the association completely escapes.

Finding themselves unable to compete for traffic under such circumstances the regulated forwarders petitioned the Commission to compel this forwarder in everything but name to cease and desist from operating without the permit required by the statute. An investigation was had upon the conclusion of which the Commission found (264 I. C. C. 134) that the activities of the association, as *then* disclosed, were properly subject to the exemption above referred to.

Later, upon petition of the Freight Forwarders Institute a second investigation was instituted. Upon this second investigation it was developed that with respect to a very substantial portion of the business handled by the associa-

[2] Los Angeles, Cal., San Francisco, Cal., Portland Ore., Spokane, Wash., Seattle, Wash., Yakima, Wash., Phoenix, Ariz., and Salt Lake City, Utah.

tion for its constituent membership, the freight charges were either (a) fully prepaid at point of origin by the nonmember consignor, or (b) such charges, paid at destination, were allowed to be deducted, as such, from the consignor's selling price. But, notwithstanding the consignee members had actually paid no freight charges, "refunds" amounting to as much as 45 cents per 100 pounds were, and continued to be, made to them.

On this showing the Commission found (269 I. C. C. 504), in effect, that as to such traffic the association was not only functioning "for profit" but that it was serving a sufficient segment of the shipping public to meet the definition of a freight forwarder as contained in section 402(5) of the act. Since the association had no permit to operate as a freight forwarder, as required by section 410(a) of the act, it was ordered to cease and desist from carrying on such activities where freight charges were either "prepaid" or "allowed" as aforesaid. It is that order which the district court has set aside.

The Questions Presented are Substantial

If the decision of the district court is allowed to stand, two things are obvious. The remedial legislation by virtue of which Congress sought to bring freight forwarders and freight forwarding within the sweep of Federal regulation may be completely thwarted by the simple expedient of setting up an "association" with a paid manager and observing the corporate forms. Secondly, the regulated forwarding industry cannot survive in the face of such unfair competition. The element of "profit" inherent in any "forwarding" operation for which exemption is sought is the touchstone controlling application or nonapplication of the statute. On this question the Commission has acted realistically. It requires sheer sophistry and an overindulgence

in semantics to conclude that a consignee is not profiting when he receives a refund out of something he did not pay.

It is of extreme importance to the freight forwarding industry and the public which it serves that the question here presented should be finally and authoritatively decided.

Copies of the District Court's opinion of January 24, 1949, its findings of fact, conclusions of law, and final decree, all dated February 18, 1949, are appended hereto.

Dated April 12, 1949.

FRANK D. CATLIN,
Title Insurance Building,
Los Angeles 13, California.
HARRY C. AMES,
Transportation Building,
Washington 6, D. C.,
Attorneys for Intervener.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 8588-WM

PACIFIC COAST WHOLESALERS' ASSOCIATION, a Corporation, and ELMER J. JENSEN, PERCY T. LYON, IRA C. LAMBERT, G. A. OLSON and SOL SMITH, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION and FREIGHT FORWARDERS INSTITUTE, *Intervenors*

OPINION

Before Stephens, Circuit Judge, and Yankwich and Mathes, District Judges

MATHES, District Judge:

Plaintiffs, a nonprofit California corporation, and individuals comprising its board of directors, seek by this action "to enjoin, set aside, suspend and annul a certain report, requirement and order of the Interstate Commerce Commission." Jurisdiction of this court is invoked under 28 U. S. C., Sec. 1336 (formerly Sec. 41(28).)

Hearing and determination of the cause by "a district court of three judges" is required by 28 U. S. C., Sec. 2325 (formerly Sec. 47), and this court was accordingly designated by the Chief Judge of the Circuit pursuant to 28 U. S. C., Sec. 2284.

The challenged action of the Commission followed "an inquiry and investigation . . . under Sec. 403(f) of the Interstate Commerce Act, instituted . . . for the purpose of determining whether the operations of the Pacific Coast Wholesalers' Association, a corporation, . . . or of its directors, officers, or representatives are in violation

of any provision of part IV of the act, or of any rule, regulation or requirement issued or established pursuant thereto . . ." (264 I. C. C. 134).

In the language of the Commission's report of November 26, 1945 (264 I. C. C. 134), "the association was formed March 27, 1935, by a small group of dealers in automotive parts at Los Angeles, California, as a voluntary unincorporated, nonprofit association, (and was later incorporated) for the purpose of promoting the interest of its members, and to provide a means of assembling, consolidating, forwarding and distributing freight for its members, on a nonprofit basis, and for the purpose of securing the benefits of carload, truckload, or other volume rates . . . No freight is handled for nonmembers . . . Believing that it was exempt under the provisions of Sec. 402(c) of part IV of the act, neither the association nor the corporation filed an application for a permit to operate as a forwarder."

The report of November 26, 1945, concluded: "It has been established in this proceeding that the traffic handled is for members of the association, that the association was founded and has been operated, in good faith, for the purpose of effecting savings in freight charges for its members by securing the benefits of carload, truckload, or other volume rates, and that the association is operated on a nonprofit basis. These are operations of the character contemplated by the exemption referred to, and may be continued without obtaining authority therefor from this Commission." Thereupon the Commission entered an order: "That this proceeding be, and it is hereby, discontinued."

Thereafter, upon petition of Freight Forwarders Institute, as intervenor, the proceedings were reopened and further hearings held. On December 18, 1947, a "Report of the Commission on Further Hearing" was filed (269 I. C. C. 504), setting aside the report of November 26, 1945.

In the second report, the Commission found, inter alia:

> "All of the shipments involved are consigned from eastern origins to the association at Chicago upon instructions of the members, and are there consolidated in carloads and forwarded to destinations or break-bulk

points and distributed to members of the association or to their customers in the destination areas . . .

"The bills of lading show the association as consignee, and Chicago as destination, with notations thereon showing the ultimate consignee and destination. They also bear, in the space provided therefor, the notations 'prepay,' 'prepay through', 'collect to Chicago and prepay through', or words of similar purport. Most of the freight bills show the charges as having been prepaid. Some of the invoices show deductions for freight allowed; and in other instances where the charges were billed collect, debit memoranda were issued by the member consignees against the consignors for the amount of the charges, or credit memoranda were issued by the consignors in favor of the consignees.

"In most instances, although the bills of lading are endorsed prepaid, the charges were not actually prepaid to the originating carrier at the time of shipment. Under a credit arrangement between the consignor and the association, the goods were billed collect to Chicago, and upon arrival the association advanced the charges to the originating carrier for its haul to Chicago and issued the association's prepaid freight bill from the point of origin to the final destination, and collected the charges from the consignor. If the charges to Chicago actually were prepaid to the originating carrier, the amount paid is credited on the association's freight bill. In other words, the association advances the charges to the consolidating point and collects from the consignor the forwarder's through less-than-carload rate from origin to destination, plus 3 percent of the total freight charge.

"At destination the freight is delivered to the member consignees or to their non-member customers without additional charge. Thereafter the member is credited with the difference between the amount paid by the consignor, and the costs borne by the association for transportation, administration, handling, distribution, taxes, etc. No refunds are made to the non-member consignors who paid the charges in the manner stated.

". . . The consolidation of such shipments, including those delivered to customers of the members, and the payment to the members of the 'savings' resulting therefrom, is common practice.

"By far the greater part of the traffic is billed to the members as sub-consignees. A relatively minor part is billed to customers of the members at the direction of the latter. All transactions relating to the purchase and sale of the customer goods are between the members and the consignors . . .

"The so-called 'savings' are the differences between the charges at the less-than-carload or less-than-truckload forwarder rate from origin to destination, plus 3 percent thereof, on the one hand, and the cost to the association of assembling, consolidating, transporting, and distributing the freight, including the inbound charges to Chicago, the terminal expenses at that point, carload charges from Chicago to destination or break-bulk points, terminal and distributing costs, and transportation taxes, plus additional items charged by the association of 13 cents for administration, 2.25 cents for billing and mailing arrival notices, and 1.125 cents for insurance, on the other hand.

"These differences or 'savings' are paid to the member consignees, regardless of the fact that the charges were collected from the consignors. Occasionally losses are sustained by the consignees because of the inclusion in the consolidated carloads of goods not subject to carload rates, but generally the association attempts to handle only freight on which a saving may be effected . . .

"The evidence clearly shows, and it is admitted by the members of the association and by its general manager, that 'refunds' are made to the members of a portion of the freight charges paid by non-member consignors."

The Commission thereupon concluded:

"(1) That the association's service in connection with shipments from nonmember-consignors to mem-

ber-consignees and their customers of goods sold on a f.o.b. destination or delivered-price basis is not a service for the association's members and is not performed on a non-profit basis within the meaning of Sec. 402(c)(1) of the act;

"(2) That the operations of the association as described . . . are those of a freight forwarder in interstate commerce within the meaning of Sec. 402(a)(5) of the act, and that continuance thereof without a permit is in violation of Sec. 410(a) of the act and therefore unlawful; [and]

"(3) That respondents [the individuals] to the extent that they are parties to such unlawful operations, are likewise in violation of Sec. 410(a) of the act."

The "requirements" of the Commission accompanying the report of December 18, 1947, read:

> "Respondents will be expected (a) to discontinue on or before March 4, 1948, the operations herein found to be unlawful and (b) to notify the Commission on or before March 19, 1948 in writing under oath that such operations have been discontinued."

The Commission has construed the somewhat equivocal verb phrase "will be expected" to connote a command. [cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 143-144 (1939).]

The petition for reconsideration having been denied, respondents commenced this action on August 30, 1948, to set aside the above quoted requirements. The "effective dates of the aforesaid requirements" have been postponed from time to time by order of the Commission, and now await final judgment herein. Both the Commission and Freight Forwarders Institute have intervened on the side of the defendants and have filed answers and briefs.

The Commission's action in question was taken under the authority of Sec. 403(f) of the Interstate Commerce Act, as amended, (49 U. S. C., Sec. 1003(f)):

> "The Commission may investigate, either upon complaint or upon its own initiative whether any freight forwarder has failed to comply with any provision of

> this chapter . . . and, after notice and hearing, take appropriate action to compel compliance therewith."

Jurisdiction to set aside a "requirement" of the Commission is conferred upon this court in Sec. 17(9) of the Act (49 U. S. C., Sec. 17(9)):

> "When an application for rehearing . . . or reconsideration of any . . . requirement . . . shall have been denied . . . by the Commission . . ., a suit to enforce, enjoin, suspend, or set aside such . . . requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."
>
> See: (28 U. S. C., Sec. 1336 (formerly Sec. 41(28); cf. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 417 (1942); *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309-312 (1927).)

However, as said in *Rochester Tel. Corp.* v. *United States*, supra, 307 U. S. 125, 139-140 (1939), "the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

The full record before the Commission has been brought here, and it appears beyond dispute that there is evidence of substance to support the Commission's findings of fact (*Louisiana etc. Ry. Co.* v. *United States*, 257 U. S. 114, 116 (1921); *I. C. C.* v. *Union Pacific*, 222 U. S. 541, 547-548 (1912)). "The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion . . . The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." (*Miss. Valley Barge Co.* v. *United States*, 292 U. S. 282, 286-287 (1934).)

The courts will not consider the wisdom of the "requirement" in question, or substitute their judgment for that

of the Commission (*Assigned Car Cases*, 274 U. S. 564, 580 (1927); *New England Divisions Case*, 261 U. S. 184, 204 (1923); *I. C. C.* v. *Illinois Central R. R.*, 215 U. S. 452, 470 (1910)). So the precise question here is whether the facts found by the Commission show respondent Pacific Coast Wholesalers' Association to be a "freight forwarder" within the meaning of Sec. 402 of the Interstate Commerce Act (49 U. S. C., Sec. 1002). Section 402(a)(5) provides that:

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, . . . for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8 or 12 of this title."

Section 402(c) of the Act (49 U. S. C., Sec. 1002 (c)) declares that:

> "The provisions of this chapter shall not be construed to apply . . . to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . ."

The December 18, 1947 report of the Commission states: "Simple logic would dictate the conclusion that in handling shipments on which freight is borne by nonmember-consignors, the association is operating for hire and therefore

for profit." But earlier in the report the Commission found that: "All transactions relating to the purchase and sale of the customer goods are between the members and the consignors." And further that: "These differences or 'savings' are paid to the member consignees, regardless of the fact that the charges were collected from the consignors."

It is true of course, as the Commission points out, that "where goods are f.o.b. destination, it is ordinarily the seller who bears the freight, who suffers from the excessive charges," and the purchaser who pays the freight does so "solely as agent of the seller" (*Louisville & Nashville R. R. Co.* v. *Sloss-Sheffield etc. Co.*, 269 U. S. 217, 235, 238 (1925)). But those are matters of contract between the seller-consignor and the purchaser-consignee.

Here the determinative inquiry is not as to agency as between consignor-seller and consignee-member (cf. Adams v. Mills, 286 U. S. 397, 406-407 (1932)), but as to the agency relationship between both or either of them and the association. And the facts found by the Commission admit of but one conclusion as to this: That the association at all times acts solely at the request, and under the direction, and for the account and benefit, of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.

The existence of this agency is implicit in the findings of the Commission. The report states that "All of the shipments involved are consigned . . . upon instructions of the members" of the association. Admittedly, the facilities of the association are not available to a nonmember shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.

When this principal-agent relationship between member-purchaser and the association is borne in mind it is clear

that there is no profit to the association from the activities described in the Commission's report (49 U. S. C., Sec. 1002(c)); and it is equally clear that the association, as agent for the members, does not "hold itself out to the general public to . . . provide transportation of property . . . for compensation" (49 U. S. C., Sec. 1002(a)(5)).

The court is of opinion therefore that inasmuch as respondent association acts only as agent of its members "in consolidating or distributing freight . . . for the members . . . on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates," respondents are not subject to regulation in such activities by the Commission pursuant to part IV of the Interstate Commerce Act. Which is to say that the conclusions reached by the Commission in the report of November 26, 1945 (264 I.C.C. 134) were correct.

Accordingly the court holds that the conclusions and requirements of the Commission, predicated upon the report of December 18, 1947 (269 I.C.C. 504), have no rational basis, and must be set aside.

Plaintiffs will submit findings of fact, conclusions of law and judgment setting aside the requirements of the Commission as prayed for, pursuant to local rule 7 within ten days.

January 24, 1949.

ALBERT LEE STEPHENS,
Circuit Judge.
LEON R. YANKWICH,
District Judge.
WM. C. MATHES,
District Judge.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

No. 8588-WM

PACIFIC COAST WHOLESALERS' ASSOCIATION, a Corporation, and ELMER J. JENSEN, PERCY T. LYON, IRA C. LAMBERT, G. A. OLSON and SOL SMITH, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION and FREIGHT FORWARDERS INSTITUTE, *Interveners*.

Hugh Gordon, Gordon, Knapp and Hennessy, 453 South Spring Street, Los Angeles 13, California, MIchigan 1997, Attorneys for plaintiffs.

Findings of Fact and Conclusions of Law

The above entitled cause came on regularly for trial on October 26, 1948, before a special court composed of three judges, the Honorable Albert Lee Stephens, Circuit Judge presiding, and Honorable Judges Leon R. Yankwich and William C. Mathes, District Judges; Hugh Gordon and Gordon, Knapp and Hennessy appearing by Hugh Gordon as counsel for plaintiffs; Herbert A. Bergson, Assistant Attorney General, Edward Dumbauld, Special Assistant to the Attorney General, James M. Carter, United States Attorney, Clyde C. Downing, Assistant United States Attorney, and James C. R. McCall, Jr., Assistant United States Attorney appearing by Edward Dumbauld as counsel for the defendant, the United States of America; Daniel W.

Knowlton, Chief Counsel of the Interstate Commerce Commission and H. L. Underwood, Attorney for the Interstate Commerce Commission appearing by H. L. Underwood for the Interstate Commerce Commission, Intervenor; and Messrs. Harry C. Ames and Giles Morrow appearing by Giles Morrow for Freight Forwarders Institute, Intervenor;

Said court having examined the pleadings submitted by the respective parties and the full record of the proceeding before the Interstate Commerce Commission culminating in the "Report of the Commission on Further Hearing" filed December 18, 1947, and reported in 269 I.C.C. 504; and said court having heard the arguments of said respective parties; and

Said court having fully considered such pleadings, record, and argument and having heretofore filed herein its written opinion, and good cause appearing;

Now, Therefore, said court makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

1. Plaintiff, Pacific Coast Wholesalers' Association, is a non profit corporation organized pursuant to the provisions of Division First, Part IV, Title XII of the Civil Code of the State of California and has its principal place of business in Los Angeles, California. It has no capital stock, does not earn or declare dividends and membership therein, limited under the by-laws to fifty, is evidenced by non-transferable membership certificates.

2. Plaintiffs, Elmer J. Jensen, Percy T. Lyon and Ira C. Lambert, members of the Board of Directors, and G. A. Olson and Sol Smith, employees of said Association, are residents of the Southern District of California.

3. The members of the said Association are and at all times referred to herein have been engaged in business in the states of California, Oregon, Washington, Utah and Arizona, as wholesalers of automotive parts, machinery, hard-

ware and other articles of property, purchased by said members from manufacturers or other suppliers located at various points east of Chicago, Illinois, and who are not members of the said Association.

4. All transactions relating to the purchase and sale of the goods comprising the said shipments are between the members of the Association, as purchasers, and the non-member consignors, as sellers, whereby provision is made in some instances for payment by the sellers, as a credit on the purchase price of the goods, of all or some portion of the amount of freight charges which would accrue on each shipment if transported under the prevailing freight forwarder rates applicable to such shipment from origin to final destination.

5. Said Association was organized and is operated to provide a means of assembling, consolidating, forwarding, and distributing freight for its members on a non-profit basis for the purpose of securing for its members the benefits of car load, truck load and other volume rates and the freight so assembled, consolidated, forwarded and distributed by the Association is comprised exclusively of property purchased by its members as aforesaid from manufacturers and other suppliers east of Chicago, Illinois.

6. At destination the freight is delivered by the Association to the member consignees or their customers and thereafter the member is credited with the difference between the amount paid by the consignor for the account of the member and the costs borne by the Association for transportation, administration, handling, distribution, taxes, and other incidental costs. No refunds are made to the non member consignors who paid freight charges or made freight allowances in the manner aforesaid.

7. The facilities of the Association are not available to a non member shipper otherwise than through arrangements made by a member wherein the member instructs the Association to handle the shipment comprising goods purchased by and consigned to such member or to a customer of such member.

8. By order dated May 6, 1944, the Interstate Commerce Commission instituted a proceeding of inquiry and investi-

gation under Section 403 (f) of the Interstate Commerce Act for the purpose of determining whether the operations of Pacific Coast Wholesalers' Association, a corporation, or its directors, officers, or representatives are in violation of any provision of Part IV of said Act or of any rule, regulation, or requirement issued or established pursuant thereto. Said proceeding is docketed and designated in the files of the Interstate Commerce Commission as "Ex Parte 160—Pacific Coast Wholesalers' Association—Investigation of States."

9. Hearings were held in said proceeding, Ex Parte 160, evidence both oral and documentary was received, briefs filed and oral argument had, following which the Interstate Commerce Commission, on December 18, 1947, rendered its Report wherein the Commission stated its Findings of Fact the substance and effect of which are contained in the Findings of Fact of the Court herein, and concluded therefrom as follows:

> "(1) That the Association's service in connection with shipments from non member-consignors to member-consignees and their customers of goods sold on a f.o.b. destination or delivered-price basis is not a service for the Association's members and is not performed on a non profit basis within the meaning of Sec. 402 (c)(1) of the Act;
>
> (2) That the operations of the Association as described . . . are those of a freight forwarder in interstate commerce within the meaning of Sec. 402 (a)(5) of the Act, and that continuance thereof without a permit is in violation of Sec. 410 (a) of the Act and therefore unlawful; (and)
>
> (3) That respondents (the individuals) to the extent that they are parties to such unlawful operations, are likewise in violation of Sec. 410 (a) of the Act."

10. By its said Report of December 18, 1947, the Interstate Commerce Commission further set forth its requirements that on or before certain specified dates respondents discontinue the operations found by said Report to be un-

lawful and to notify the Commission in writing, under oath, that such operations had been discontinued.

11. Thereafter a Petition for Reconsideration was duly filed by respondents in said proceeding before the Interstate Commerce Commission which petition was denied by the Commission prior to the commencement of this action wherein the said respondents, as plaintiffs herein, invoke the jurisdiction of this court under 28 U.S.C. Sec. 1336 and 49 U.S.C. Sec. 17 (9) to enjoin, set aside, suspend, and annul the said Report and Requirements of the Interstate Commerce Commission rendered December 18, 1947, in said proceeding, Ex Parte 160.

Conclusions of Law

1. The Association in assembling, consolidating, forwarding, and distributing freight for its members including shipments from non member consignors to member consignees and their customers of goods sold on a f.o.b. destination or delivered price basis acts exclusively as the agent of the member consignees and not as the agent of the non member consignors.

2. There is no profit to the Association resulting from its activities as the transportation agent of its members in assembling, consolidating, forwarding, and distributing freight for its said members.

3. The Association in its said activities as transportation agent of its members does not hold itself out to the general public to provide transportation of property for compensation.

4. The Association's services in connection with shipments from non member-consignors to member-consignees and their customers of goods sold on a f.o.b. destination or delivered price basis is a service for the Association's members and is performed on a non profit basis within the meaning of Section 402 (c)(1) of the Interstate Commerce Act.

5. The operations of the Association, its directors, officers and employees in assembling, consolidating, forwarding,

and distributing freight for the members of the Association are not those of a freight forwarder in interstate commerce within the meaning of Section 402 (a) (5) of the Interstate Commerce Act and continuance thereof without a permit issued by said Commission is not in violation of Section 410 (a) of the Interstate Commerce Act or otherwise unlawful.

The conclusions and requirements of the Interstate Commerce Commission predicated upon its Report of December 18, 1947, in its proceeding Ex Parte 160 have no rational basis and should be set aside.

Dated: February, 1949.

____ ____,
Circuit Judge;

____ ____,
District Judge;

____ ____,
District Judge.

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

No. 8588-WM

PACIFIC COAST WHOLESALERS' ASSOCIATION, a Corporation, and ELMER J. JENSEN, PERCY T. LYON, IRA C. LAMBERT, G. A. OLSON and SOL SMITH, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION and FREIGHT FORWARDERS INSTITUTE, *Interveners*

DECREE ANNULLING, SETTING ASIDE AND ENJOINING ENFORCEMENT OF REQUIREMENT BY INTERSTATE COMMERCE COMMISSION

Hugh Gordon, Gordon, Knapp and Hennessy, 453 South Spring Street, Los Angeles 13, California, MIchigan 1997, Attorneys for plaintiffs.

The above entitled cause came on regularly for trial on October 26, 1948, before a special court composed of three judges, the Honorable Albert Lee Stephens, Circuit Judge presiding, and Honorable Judges Leon R. Yankwich and William C. Mathes, District Judges; Hugh Gordon and Gordon, Knapp and Hennessy appearing by Hugh Gordon as counsel for plaintiffs; Herbert A. Bergson, Assistant Attorney General, Edward Dumbauld, Special Assistant to the Attorney General, James M. Carter, United States Attorney, Clyde C. Downing, Assistant United States Attorney, and James C. R. McCall, Jr., Assistant United States Attorney appearing by Edward Dumbauld as counsel for the defendant, the United States of America; Daniel W. Knowlton, Chief Counsel of the Interstate Commerce Com-

mission and H. L. Underwood, Attorney for the Interstate Commerce Commission appearing by H. L. Underwood for the Interstate Commerce Commission, Intervenor; and Messrs. Harry C. Ames and Giles Morrow appearing by Giles Morrow for Freight Forwarders Institute, Intervenor;

Said court having examined the pleadings submitted by the respective parties and the full record of the proceeding before the Interstate Commerce Commission culminating in the "Report of the Commission on Further Hearing" filed December 18, 1947, and reported in 269 I.C.C. 504; and said court having heard the arguments of said respective parties; and

Said court having fully considered such pleadings, record, and argument, and having heretofore filed herein its written opinion and Findings of Fact and Conclusions of Law; and good cause appearing;

Now, Therefore, it is hereby decreed as follows:

That the requirements of the Interstate Commerce Commission as set forth in the Report of the Commission on Further Hearing, filed December 18, 1947, in its proceeding, Ex Parte 160, that the respondents therein discontinue the operations found by said Report to be unlawful, and notify the Commission in writing, under oath, that such operations have been discontinued be and the same are hereby set aside and annulled and the enforcement thereof is hereby permanently enjoined.

Dated: February, 1949.

____ ____,
Circuit Judge;

____ ____,
District Judge;

____ ____,
District Judge.